



Submission

Public consultation on the Update of the Informal Guidance Notice by the European Commission

Response from the Netherlands Authority for
Consumers & Markets

21 June 2022

Update of the Informal Guidance Notice: background

On 24 May 2022, the European Commission (“Commission”) started a public consultation on its proposed update of the Notice on Informal Guidance¹ for novel or unresolved questions in individual cases concerning Articles 101 (agreements distorting competition) and 102 (abuse of dominant market position) of the Treaty on the Functioning of the European Union (“TFEU”) (“updated Informal Guidance Notice”).² The purpose of the Informal Guidance Notice is to specify the circumstances in which the Commission would consider issuing informal guidance to businesses.

The Informal Guidance Notice is part of the self-assessment system as introduced with Regulation 1/2003. In order to ensure that the notification system under Regulation 17/62 (repealed by Regulation 1/2003) would not in effect be reintroduced, the current Informal Guidance Notice adopted criteria narrowly interpreting the circumstances in which the Commission could provide informal guidance. However, according to the Commission such a very strict approach is no longer justified, as the system based on the principle of self-assessment by businesses has been tried and tested, and has become generally accepted by stakeholders. The desirability of a system allowing the Commission to provide informal guidance to individual businesses in case of genuine uncertainty has also been confirmed in the context of both the evaluation of the Horizontal Block Exemption Regulation³ and the consultation on competition policy and sustainability⁴.

The purpose of the proposal is therefore to update the criteria in the current Informal Guidance Notice to enable the Commission to provide informal guidance to businesses, in cases in which they are genuinely uncertain about the application of antitrust rules. This will enable the Commission to use this tool more flexibly to the benefit of businesses and to increase legal certainty.

ACM’s views on the proposed update of the Informal Guidance Notice

ACM supports the proposed update

The Netherlands Authority for Consumers & Markets (“ACM”) would hereby like to express its support for the Commission’s proposed update of the Informal Guidance Notice.

ACM believes that introducing a more flexible approach for businesses to consult a competition authority for informal guidance, by including unresolved issues and a broader definition of novel issues, is a much welcomed opportunity. ACM has provided informal guidance in general and more in particular regarding sustainability in several cases. It is ACM’s experience that a more flexible approach can remove unnecessary reluctance to set-up genuine cooperation agreements. Especially for new and untested topics like sustainability.

Furthermore, ACM believes that adopting a more flexible and pragmatic approach does not lead to a *de facto* reintroduction of a notification system, nor does it mean a replacement of the duty of self-assessment as informal guidance is an exception to the general rule of self-assessment and under the proposed update businesses will still need to present their self-assessment to the Commission.

In sum, ACM agrees with the Commission that the criteria in the current Informal Guidance Notice are too strict and no longer justified for the system of self-assessment.

ACM’s suggestions for improvement

Having in place a more flexible framework under which the Commission can provide informal guidance as set out above, will have a positive impact. However, to attain the objectives of the Green Deal for the European Union, a switch to a new economic model is required, which necessitates the thinking through of all of the production and distribution processes of each and every economic actor. Additional economic

¹ Commission Notice on informal guidance relating to novel questions, OJ C 101, 27.4.2004, p. 78 (“Informal Guidance Notice”).

² European Commission, link: https://ec.europa.eu/competition-policy/public-consultations/2022-informal-guidance-notice_en.

³ Evaluation Staff Working Document of 6 May 2021.

⁴ Competition Policy Brief 2021-01 of September 2021, p. 3.

uncertainty justifies, if possible, a high (or higher) degree of legal certainty. The Commission itself (in common with ACM and other NCA's) has called upon businesses to come forward with their initiatives of sustainability agreements in order to give guidance, and, in turn, gain expertise in this area.

In order to provide this legal certainty, to stimulate initiatives in this area and gain the necessary expertise, ACM strongly suggests to include a more explicit reference to sustainability initiatives in the updated Informal Guidance Notice. Preferably, the Commission would provide informal guidance to *all* initiatives in the area of sustainability, i.e. not only those fulfilling the set of conditions. This could be done either by introducing a separate category for sustainability initiatives in the Informal Guidance Notice or by creating a separate document, as ACM did in its draft Guidelines on Sustainability Agreements⁵. This would be in line with the proposed Horizontal Guidelines, which include a separate chapter on sustainability agreements. It would also create the opportunity for the Commission to adopt a more lenient approach specifically for those agreements (and/or unilateral practices).

Alternatively, ACM would like to urge the Commission to interpret the conditions set in the proposed updated Informal Guidance Notice as flexibly as possible when it comes to sustainability initiatives. This in order to avoid the unintended consequence of deterring undertakings coming forward with their sustainability initiatives and hindering the achievement of the objectives of the Green Deal.

In any case, ACM would like to make the following suggestions for the updated Informal Guidance Notice:

1. Point 6 of the proposed updated Informal Guidance Notice holds that the Commission may “only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities”. It is ACM's understanding that providing guidance on sustainability agreements, with a view to the Green Deal, clearly is a priority. This avoids accidental greenwashing and stimulates the adoption of genuine sustainability agreements. ACM suggests making an explicit reference to the Green Deal and/or sustainability in this regard.
2. Point 7 of the proposed updated Informal Guidance Notice holds that the Commission will base its prima facie assessment on two cumulative criteria: (a) novel or unresolved questions and (b) interest in providing guidance. The latter includes several elements which are taken into account to determine whether providing guidance would have significant added value. ACM has suggestions for two of those elements:
 - “the actual or potential economic importance of the goods or services concerned by the agreement or unilateral practice, in particular taking into account the consumers' interests”. ACM suggests to add to the economic importance of the goods or services concerned “*and/or the presence of negative externalities of the goods or services concerned*”, and/or to include a reference to the general interest and wellbeing in the European Union, in addition to the reference to the interests of consumers, for example.
 - “whether the objectives of the agreement or unilateral practice are relevant for the achievement of the Commission's priorities or Union interest”. It is ACM's understanding that giving guidance on sustainability agreements is clearly in line with the Commission's priorities or Union interest. ACM suggests to also make an explicit reference to the Green Deal and/or sustainability in this regard.
3. Point 9 of the proposed updated Informal Guidance Notice holds that “undertakings may [...] present a request for a guidance letter to the Commission in relation to questions raised by an agreement or unilateral practice that they envisage, i.e. before the implementation of that agreement or unilateral practice. In this case planning must have reached a sufficiently advanced stage for a request to be considered”.

⁵ ACM, July 2021, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>.

ACM notes that it is indeed helpful if businesses present their initiatives at an early stage. With this in mind, ACM also welcomes the proposed switch in the last sentence from '*the transaction*' in the current Informal Guidance Notice to '*planning*' in the updated version. Encouraging market participants to approach the Commission in the planning phase secures room for adjustments in case of foreseeable risks for the competitive process. At the same time, ACM agrees that planning must have reached a sufficiently advanced stage to be able to give 'good' guidance. It also avoids the competition authority giving guidance in a 'stop and go mode', because e.g. features of the initiative are still subject to (fundamental) alterations.

It is also ACM's experience though that when it comes to sustainability initiatives, informal guidance should preferably be given at a relatively early stage in the process. This is not only because these initiatives generally concern emerging or transforming markets, but also to ensure sustainability initiatives are set-up in the first place. In the Netherlands, businesses sometimes experience, or shield with, competition law as a barrier to conclude sustainability agreements. This perspective might hinder the much needed achievement of sustainability goals like CO₂ reduction. Offering the opportunity to request informal guidance at an early stage might in those instances form a solution. For example, an NGO might have a very good sustainability initiative. If, however, businesses shield with competition law as a barrier to not start negotiating about this initiative, informal guidance might be desired and actually required – in particular at such an early stage – in order to bring businesses to the table and to ensure that competition law is not seen or used as a barrier to conclude sustainability initiatives. Furthermore, from ACM's own informal guidance practice follows that frequently sustainability initiatives do not restrict competition at all. Giving guidance at an early stage can in those cases remove any unnecessary reluctance in agreeing upon the extent and intensity of the cooperation and as a result achieving the highest sustainability benefits. Therefore, ACM would suggest changing the wording into "undertakings *should preferably* [...] present a request [...] before the implementation of that agreement or unilateral practice".

4. Point 10 of the proposed updated Informal Guidance Notice states that "a request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or unilateral practice that could fall within the scope of Articles 101 or 102 TFEU with regard to question of interpretation raised by such agreement or unilateral practices". Reading this point in combination with the previous point, point 9, in particular that "a request *can* be presented by an undertaking or undertakings", does not sound particularly inviting for businesses to come forward with their initiatives. The first sentence could therefore be reformulated as follows: "*The Commission encourages an undertaking or undertakings which have entered into or intend to enter into an agreement or unilateral practice that could fall within the scope of articles 101 or 102 TFEU with regard to question of interpretation raised by such agreement or unilateral practices as soon as possible*".
5. Point 12 of the proposed updated Informal Guidance Notice holds that the applicant should include in its request for guidance, among other elements, "full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation". It is understandable that the bar should not be too low and that disposing of such information is a prerequisite for providing 'good' guidance. It is also the undertaking that is most experienced with their own markets and dispose of the relevant expertise and information. This is especially the case when dealing with large and/or multinational corporations. There is a risk that businesses observe this process as demanding and burdensome, however. ACM, therefore, would like to urge the Commission to take a flexible and pragmatic approach to this in the individual cases and avoid that its request for "full and exhaustive information" has the unintended consequence of deterring companies from coming forward with their sustainability initiatives.
6. An additional incentive for businesses to come forward with their initiatives, as the Commission envisages, could be given by the introduction of an immunity from fines clause. Immunity from fines is not a novelty in competition policy, given the Leniency Notice in relation to article 101 TFEU. Fine immunity could be introduced along the lines of ACM's approach. Meaning that if a sustainability agreement was discussed with ACM well in advance, and ACM has not identified any major competitive

concerns, but these agreements eventually turn out to be incompatible with the Dutch Competition Act, ACM will not impose a fine. If, in those cases, the parties involved expeditiously adjust their agreements as requested by ACM, ACM will not impose any fines. The introduction of fine immunity could be accompanied by the duty for the businesses to contact the Commission in the case of altered facts or new information.

7. Moreover, ACM suggests including some examples of initiatives which are eligible for informal guidance, either in the document itself and/or in an accompanying press release. For example, with regard to sustainability initiatives, one could think of a further explanation of the soft safe harbour introduced in the draft horizontal guidelines, the fair-share criteria, qualification and quantification of the benefits of sustainability agreements, etc.

Finally, as set out above, ACM has much experience in providing informal guidance in general and more in particular regarding sustainability. From this practice, it has gained much invaluable expertise and provided several market participants with the legal certainty they were looking for. ACM invites the Commission to seize this opportunity, too, and also take the necessary steps to obtain the desired experience with the sustainability initiatives. ACM would welcome an opportunity to share its experience on informal guidance with the Commission in greater detail as background to the suggestions listed above.